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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALFREDO OCHOA, Defendant and Appellant.	B236574 (Los Angeles County Super. Ct. No. VA 119155)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael A. Cowell, Judge. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

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Alfredo Ochoa appeals from his conviction for two counts of making criminal threats based on statements he made after a bar fight. Appellant contends (1) the verdicts are not supported by substantial evidence, and (2) he may be convicted of only one count of making a criminal threat. We disagree and affirm the judgment.

STATEMENT OF FACTS

Appellant encountered the victims, Daniel and George Zubia, at a bar in Whittier.[1] Appellant had consumed several beers and shots of alcohol and appeared intoxicated. Appellant challenged the Zubia brothers, who were strangers to him, to a game of billiards, and when they refused, he drank from their pitcher of beer without permission. George then angrily confronted appellant. Daniel saw appellant raise the pool stick he was holding as if to strike George. George saw the pool stick coming at him and grabbed it with his hand. Daniel began punching appellant and an onlooker grabbed the cue stick away from appellant. Appellant's friend restrained him from continuing the fight.

Appellant then told Daniel and George he was going to come back and shoot them. George heard appellant repeat several times, "Let's go get my cuete.[2] I'm going to kill all of you." A witness heard appellant say he was going to go get a gun or a "gat." Appellant and his friend left shortly thereafter. A police officer responding to a 911 call from the bartender followed appellant's car out of the parking lot and detained him two to four miles from the bar. Daniel and George remained at the bar until the police arrived.

When appellant said these things to the victims, George felt threatened, scared, and feared for his life. During the interaction, he yelled at the bartender to call the police several times. Daniel felt "awful" about the threats and, because appellant was a stranger, he worried that appellant might be capable of coming back to the bar and shooting him and his brother. He felt that way throughout the night, pondering what could have happened if the police had not caught appellant.

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1 We refer to the Zubia brothers by their first names rather than their surname to avoid confusion. We do not intend this informality to reflect a lack of respect.

2 "Cuete" is a Spanish slang term for gun.

PROCEDURAL HISTORY

Appellant was charged in count 1 with assault with a deadly weapon and two counts of making criminal threats, one against George and one against Daniel. The jury found appellant guilty on counts 2 and 3. The jury did not reach a verdict on the first count and the trial court dismissed the charge. Appellant admitted to one prior serious felony conviction and one prior prison term under Penal Code section 667.5, subdivision (b).[3] The court struck the section 667.5, subdivision (b) allegations. It sentenced appellant to 16 months on count 2 and doubled the term for a total of 32 months as a consequence of appellant's prior strike, and then it added a consecutive five-year term pursuant to section 667, subdivision (a)(1). The court also sentenced appellant to a concurrent 32-month term on count 3.

DISCUSSION

1. Substantial Evidence Supports Appellant's Convictions on Counts 2 and 3

Appellant contends there was insufficient evidence to support his convictions for making criminal threats against Daniel and George. Appellant's contention lacks merit.

We apply the substantial evidence standard of review to a claim that the evidence is insufficient to support a conviction. (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1347.) Under that standard, we review the record in the light most favorable to the judgment """to determine whether it contains evidence that is reasonable, credible, and of solid value,""" from which a rational trier of fact could find all the elements of a crime beyond a reasonable doubt. (*In re George T.* (2004) 33 Cal.4th 620, 630-631 (*George T.*).) Even if the evidence could reasonably support findings contrary to the trier of fact's, we will not reverse so long as the evidence also reasonably supports the judgment. (*People v. Bean* (1988) 46 Cal.3d 919, 933.) Moreover, "a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

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[3] All further statutory references are to the Penal Code unless otherwise indicated.

Not all threats are criminal in nature. The prosecution must prove the following elements under section 422: "'(1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat – which may be "made verbally, in writing, or by means of an electronic communication device" – was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances.' [Citation.]"[4] (*George T., supra,* 33 Cal.4th at p. 630.)

Appellant's arguments concern the immediacy of the threat and whether the victims were truly in sustained fear for their safety.

A. Immediacy of the Threat

Appellant contends that because the violence had concluded by the time appellant threatened the victims, there was no immediate prospect of execution of the threat; rather, these statements "were merely the angry or ranting soliloquies of a drunk person."

Section 422 provides that the threat must be "so . . . unconditional . . . as to convey to the person threatened, a gravity of purpose and an immediate prospect of

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[4] Section 422 provides in relevant part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally [or] in writing . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it was made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety . . . , shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

execution . . . ." (§ 422.) "'The use of the word "so" indicates that unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim.'" (*People v. Bolin* (1998) 18 Cal.4th 297, 340, quoting *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1157.) The threat must be examined in light of the surrounding circumstances. (*People v. Bolin, supra*, at p. 340.)

The circumstances here indicate that the threat was grave and conveyed an immediate prospect of execution. Appellant was acting erratically and appeared to be stumbling drunk. He drank from the victims' beer pitcher without their consent and attempted to get them to play pool with him for large sums of money. He also raised a pool stick in an apparent desire to strike George. A fight ensued, further indicating that appellant was willing to use force. Appellant threatened repeatedly to get a gun and shoot the victims. There was substantial evidence from which a jury could find appellant's threats immediate and more than just drunk rantings.

Appellant notes that the arresting officer did not find a gun in appellant's car, implying that appellant was not able to carry out the threat. However, it is irrelevant to section 422 that no gun was found, because it is the intent that the statement be taken as a threat, not appellant's actual ability to carry out the threat, that is dispositive. (*George T., supra*, 33 Cal.4th at p. 630.) The victims had no way of knowing if appellant had a gun nearby; instead, the threat must be assessed given the circumstances as they existed at the time of the threat. (*People v. Bolin, supra,* 18 Cal.4th at p. 340; *People v. Brooks* (1994) 26 Cal.App.4th 142, 140.)

Appellant's reliance on *In re Ricky T.* (2001) 87 Cal.App.4th 1132 is misplaced. There, the court held there was insufficient evidence to support a 16-year-old student's criminal threats conviction when he said to a teacher, "I'm going to get you," and "I'm going to kick your ass," and he admitted "getting in [the teacher's] face." (*Id.* at pp. 1135-1136.) The court noted that the police were not called until the day after the incident and the fact that the appellant was sent to the principal's office following the

incident did not establish that the threat was sufficiently immediate. (*Id.* at pp. 1137-1138.) Moreover, "there was no evidence offered that appellant's angry words were accompanied by any show of physical violence." (*Id.* at p. 1138.) Here, in contrast, a physical altercation immediately preceded appellant's threats, George repeatedly yelled for the bartender to call the police during the fight, and the police were called immediately. *In re Ricky T.* can therefore be distinguished.

B. Sustained Fear

Appellant contends that the victims were not sufficiently fearful about their safety so as to satisfy the elements of a criminal threats conviction. He also contends that the fact that they remained at the bar after being threatened indicates they did not truly take the threat seriously.

The victims both testified that they feared for their lives and thought that appellant might return with a gun and shoot them. "The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.) The victims' testimony is neither physically impossible nor inherently improbable. While the evidence indicated the victims fared better than appellant in the altercation, the outcome of the fight does not change that the victims reasonably believed appellant might get his gun and return to the bar, based on appellant's erratic and violent behavior. (See *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431-1432 [holding that even though defendant was in jail and could not carry out threats to former girlfriend immediately, she reasonably believed he would be released and would follow through on the threats, based on defendant's history of assaulting her].) Indeed, one might conclude that having been bested in the altercation, appellant would be more motivated than not to return with a deadly weapon.

Appellant argues that if the victims were truly in fear for their lives, they would not have remained at the bar until the police arrived. This argument is nothing more than a call for us to determine that the victims were not credible when they testified to their fear. Based on the verdict, it is evident that the jury found the victims' testimony as to

their fear credible. We may not replace the jury's judgment regarding credibility with a different one. Moreover, we note that there are any number of logical reasons why the victims might remain at the location where appellant threatened them while waiting for the police. The fact that they remained at the bar is not necessarily inconsistent with fearing appellant.

2. Appellant May Be Convicted of and Sentenced for Two Counts of Making Criminal Threats

The jury convicted appellant of two counts of making criminal threats, one count for each victim. The court directed that the sentences run concurrently. Appellant contends that he made only a single threat to one or all in the bar and he therefore could only be convicted of one count of making criminal threats. Appellant fails to persuade.

"A charge of multiple counts of violating a statute is appropriate only where the actus reus prohibited by the statute -- the gravamen of the offense -- has been committed more than once." (*Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 349.) Here, the gravamen of the offense is not just making threats but the infliction of sustained fear on another person via a threat. "In enacting section 422 as part of the California Street Terrorism and Enforcement Prevention Act, the Legislature declared that every person has the right to be protected from fear and intimidation." (*People v. Martinez* (1997) 53 Cal.App.4th 1212, 1221.) "One may, in private, curse one's enemies, pummel pillows, and shout revenge for real or imagined wrongs -- safe from section 422 sanction." (*People v. Teal* (1998) 61 Cal.App.4th 277, 281.) But "if one broadcasts a threat intending to induce sustained fear, section 422 is violated if the threat is received and induces sustained fear." (*Ibid.*) The court in *People v. Solis* (2001) 90 Cal.App.4th 1002, 1024, characterized section 422 as a crime of "psychic violence" because it required the "*knowing infliction of mental terror*" against a person. The statute thus requires a victim who suffers a sustained fear of death or injury because of a threat. Even a single threat may support multiple charges and convictions based on the number of victims injured by the threat.

Substantial evidence showed that appellant committed the actus reus -- the gravamen of the offense -- against both Daniel and George. Both men heard the threats, and both were in sustained fear. Daniel testified that appellant twice claimed that he was going to return and kill Daniel and George. In addition, George testified that appellant said he was going to go get his gun and kill them all. Furthermore, a third witness testified that appellant said he was going to go get a gun. And, as discussed in the foregoing part, the victims both testified that they feared for their lives and actually thought that appellant might return with a gun and shoot them. The evidence supported two convictions for making criminal threats.

Although appellant argues that he may be *convicted* of only one count, to the extent he is suggesting that he could be *sentenced* for only one count, he is also unpersuasive. Section 654 generally prohibits multiple punishments for a single criminal act. Section 654, subdivision (a), provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." But section 654 does not apply when a defendant commits the same violent act against multiple victims. "A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person. . . . Section 654 is not '. . . applicable where . . . one act has two results each of which is an act of violence against the person of a separate individual.'" (*Neal v. State of California* (1960) 55 Cal.2d 11, 20-21.)

A violation of section 422 is "an act of violence" within the meaning of the multiple victim exception. (*People v. Solis, supra,* 90 Cal.App.4th at pp. 1023-1024 [holding a criminal threat to be an act of violence and noting that the infliction of mental terror is as deserving of moral condemnation as the infliction of physical injury].)[5] Even

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[5] *People v. Solis, supra,* 90 Cal.App.4th 1002, referred to a violation of section 422 as "making a terrorist threat," as opposed to "making a criminal threat." In 2000, the

assuming appellant made only a single threat to one or all in the bar, he committed an act of violence against at least two victims, and the multiple victim exception to section 654 applies. It was permissible for the court to impose multiple sentences.

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.

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heading of title 11.5 of the Penal Code, containing section 422, was changed from Terrorist Threats to Criminal Threats. (Stats. 2000, ch. 1001, § 4; Stats. 1988, ch. 1256, § 4, p. 4184; *People v. Toledo* (2001) 26 Cal.4th 221, 224, fn. 1.) The 2000 change did not alter the text of section 422 itself.